Petition

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In the Supreme Court of the United States

October Term, 1981

GALEN J. BAIRD, and CAPITAL AIR SERVICE, INC., and VANGUARD INSURANCE COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the allegations of negligence based on the United States' inaccurate accumulation, standardization, publication and distribution of inaccurate and dangerously misleading symbolic information in the Wichita Aeronautical Sectional Chart give rise to a cause of action under the Federal Torts Claims Act that is not barred by the discretionary duty or function exception?

2. Whether a cause of action under the Federal Torts Claims Act based on the failure to warn of known dangers or hazardous conditions is barred by the discretionary duty or function exception?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 29, 1981.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

The unpublished opinion rendered by the district court for the District of Kansas, also, appears in the appendix hereto.

JURISDICTION

Judgment of the Court of Appeals for the Tenth Circuit was entered on June 29, 1981. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Section 1346. *United States as defendant.*

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of all civil actions on claims against the United States, for money damages, occurring on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

United States Code, Title 28:

Section 2680. *Exceptions.*

The provisions of this chapter and Section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

STATEMENT OF THE CASE

1. Facts Material to Consideration of Questions Presented.

At approximately 9:30 p.m. on July 27, 1976, Galen J. Baird, a pilot, and three passengers flew in Kansas from Ulysses to Greensburg. The group traveled in a Piper Cessna, small aircraft. Baird, on making his landing approach at the Paul Windle Field in Greensburg, used the Wichita sectional aeronautical chart (16th Ed., June 17, 1976). The symbols

Paul Windle
2230-L-28

appeared on the chart. According to the chart's legend, "Paul Windle" symbolized the name of the airport. The "2230" indicated "elevation in feet (above sea-level)." The "28" described the "length of the longest runway in hundreds of feet." Finally, the symbol "L" was to be interpreted according to the following legend:

"L - lighting in operation sunset to sunrise

'L - lighting available sunset to sunrise only on request (by radio call, letter, phone, telegram). (L - lighting in operation part of the night and on request,

> or not operating thereafter. When facility or information is lacking, the respective character is replaced by a dash.)' "

From the sectional chart, then, Baird could infer that the runway lights would be on at Paul Windle airport from sunset to sunrise. And, in fact, they were. However, from the sectional chart Baird could not know the runway lights he saw from the air did not mark off Paul Windle's longest runway whose length in hundreds of feet was reflected in the "28" symbol. Tragically, the lighted runway was not Paul Windle's longest. The lighted runway was the shorter one - only 2,580 feet long. Moreover, the runway was lighted for only 2,176 of its 2,580 feet. Baird, thinking he was landing on the longest lighted runway landed mid-strip on the shorter lighted runway; the aircraft ran off the end of the runway and crashed. Two passengers were killed while a third passenger and Baird received serious injuries.

The Wichita sectional aeronautical chart (6th Ed., June 17th, 1976), was published in accordance with Inter-Agency Air Cartographic Committee specifications and agreements approved by the Department of Defense, Federal Aviation Administration, and the Department of Commerce.

The Department of Defense, the Federal Aviation Administration and the Department of Commerce, agencies of the United States Government by agreement in 1965, established the Inter-Agency Air Cartographic Committee (IACC). The agreement defined a major purpose of the IACC as follows:

> (T)o develop those final charts and textual material specifications which will provide acceptable flight information materials for operation in the airspace and for adequately controlling operations in that airspace. . . .

In exercise of its authority, the IACC promulgated specifications, which pertinently provide:

> (5) The airport name shall be supported by the following coded data, positioned immediately above, following or below the airport name as indicated. A dash shall be substituted for the elevation, lighting, or runway length when not shown.
>
> * * *
>
> (e) Lighting symbolization shall indicate the availability of runway lighting to facilitate night landings, and shall be shown below the airport name following the elevation. Runway lighting is defined as a system of lights which defines the usable runway surface and includes lateral lights, referred to as runway lights which mark the sides of the runway, and the threshold lights which mark the ends. Lighting and operation sunset to sunrise shall be indicated by the letter "L." Lighting available sunset to sunrise only on request (by radio call, letter, phone, telegram) shall be indicated by an asterisk (*) preceding the letter "L." Lighting on and operating part of the night and on request, or not operating thereafter, shall have the letter "L" in parenthesis, e.g. (L). The absence of a night lighting capability will be indicated by a short dash in lieu of the letter "L."
>
> (f) The runway length shall be positioned below the airport name following lighting. Runway length shall be the actual length of the longest active runway (pavement, end to end), including displaced thresholds, but excluding those areas designated as overruns. Runway length shall be shown to the nearest 100 feet using 70 as the division point; e.g., 59 shall be used to indicate a runway of 5,870.

Before the accident the legend for the sectional aeronautical chart in question could have been changed to alert the pilot to an abnormality by substituting the current definition of the symbol "L" with a statement alerting the pilot to lighting length abnormalities and further indicating the longest runway may not necessarily be lighted.

Even according to the FAA, it was possible on the date of the accident to add a note to the legend of all sectional charts explaining that usable airport runway length may be less than physical length shown on the chart and that availability of runway light does not necessarily mean the lighted runway is the longest runway or that it is lighted full length.

2. Basis for Federal Jurisdiction in First Instance and Disposition Below.

Claims were presented to the Department of Defense, Department of Commerce and the Federal Aviation Administration under the Federal Torts Claims Act.

When those claims were denied *Galen J. Baird v. United States, Capital Air Service, Inc. and Vanguard Insurance Co., Intervenors,* an action by a pilot for personal injury in which his employer and employer's insurer assert a workman's compensation subrogation interest and *Capital Air Service, Inc., and Vanguard Insurance Co. v. United States,* an action for property damage by Baird's employer in which the employer's insured asserts a subrogation claim, were filed pursuant to the Federal Torts Claims Act, 28 U.S.C. §1346, in which petitioners sought recovery for damages from the United States for negligent accumulation, standardization, publication and distribution of inaccurate and dangerously misleading symbolic information in the Wichita aeronautical sectional chart regarding the Paul Windle airport, Greensburg, Kansas. On June 11,

1979, by order of Howard K. Phillips, clerk, Tenth Circuit Court of Appeals, the two cases were consolidated. Specifically, the petitioners contended the United States should be held liable because the chart failed to inform the pilot (1) that the longest runway at Paul Windle's airport was not the lighted runway and (2) that the shorter runway had lighting on only 2,176 of its 2,580 feet.

The United States moved in each case to dismiss the complaint. (Or in the alternative the United States moved for summary judgment.) The United States argued the information on the chart fully complied with specifications of the IACC and the United States District Court for the District of Kansas lacked subject matter jurisdiction because of the development of those specifications fell within the "discretionary function" exception to the Federal Torts Claims Act, 28 U.S.C. §2680(a). The petitioners filed a response in which they stated the governmental activity in this case - the accumulation, standardization, publication and distribution of false and misleading symbology - fell outside the scope of the discretionary exception contained in the Federal Torts Claims Act; the petitioners further contended that - even if the activity fell within the discretionary function - the exception does not apply in the situations involving a duty to warn of life-endangering peril.

The United States District Court for the District of Kansas dismissed the petitioners' complaints. Petitioners appealed and the United States Court of Appeals for the Tenth Circuit affirmed the dismissal of the complaints. In a two to one decision by a panel of the Court of Appeals, the majority held any negligence that could be proved did not attend the mechanical preparation of the aeronautical chart, but attended the substance of the design and, therefore, related to discretion or judgmental activites by the

government. The Court of Appeals found 28 U.S.C. §2680(a) exempted the petitioners' claims from the Federal Torts Claims Act and the federal courts are without subject matter jurisdiction to hear such claims.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 28 U.S.C. §2680(a)

In this Court's most recent reference to the discretionary exception of the Federal Torts Claims Act, 28 U.S.C. §2680(a), this Court recognized the uncertainty a lower federal court faces in applying the exception.

> Like the governmental/proprietary distinction, a clear line between the municipalities "discretionary" and "ministerial" functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Torts Claims Act, 28 U.S.C. §2680(a).

Owen v. City of Independence, 445 U.S. 622, 648 n. 31 (1980).

Petitioners contend the grant of writ of certiorari is appropriate in this case for the following reasons: (1) The federal courts' difficulty in drawing a distinction between exempted and nonexempted tort claims, identified in *Owen*, has resulted in a hopeless split among the Circuit Court of Appeals as to the parameters of the discretionary exception; (2) the developing rule that a failure to warn of known dangers or hazardous conditions is without the discretionary exception has never been before this Court.

1. This Court's Treatment of 28 U.S.C. §2680(a).

To a large extent the lower courts' difficulties lie in the dearth of Supreme Court cases interpreting the discretionary exception. Only in *Dalehite v. United States*, 346 U.S. 15 (1953), has this Court directly spoken to the exception. *Dalehite* relieved the United States of all liability for its actions leading up to and during a Texas fertilizer explosion disaster. In setting some parameters for the discretionary function exception, this Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of Sec. 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the supervisor, exercising, perhaps abusing, discretion.

346 U.S. at 35-36.

In the application of the facts in *Dalehite*, an expansive definition of "discretionary function" was applied by this Court to virtually every aspect of the Government's involvement in the fertilizer tragedy. However, this Court's opinion can also be read to suggest a limited construction

of a discretionary function exception. For example, the *Dalehite* decision noted that "[t]he decisions held culpable were all . . . more or less important to the practicality of the government's fertilizer program." 346 U.S. at 42. Thus, without drawing an inflexible line, this Court seemed to distinguish between decisions more critical to the whole of the government program and those that are less critical—those that would affect only an incidental aspect of a larger undertaking. In terms less tied to the facts of the case before it, this Court also mentioned such factors as existence or absence of positive rules of law that might make the challenged decision, *Id.* at 34, and the "policy" nature of the judgment made, *Id.* at 36, subject to judicial review.

Accordingly, primary significance to such factors would focus the inquiry into whether a particular activity was discretionary upon the nature of the activity at issue; contrary to the reading of *Dalehite* that would equate decision making with discretion, such a focus would suggest that decision making is not *per se* discretionary. Also contributing to a restrictive construction of the discretionary function exception are the Supreme Court decisions after *Dalehite,* which, while ostensively not involving the discretionary function exception at all, limit the expansive reading of *Dalehite's* interpretations of the exception. In *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), the government conceded that the governmental activity at issue was, in *Dalehite's* terms, "operational." 350 U.S. at 64. In *Rayonier, Inc. v. United States,* 352 U.S. 315 (1957), this issue was never mentioned or even alluded to in any of the reported decisions of the case. *See Rayonier, Inc. v. United States,* 225 F.2d 642 (9th Cir. 1955), *vacated and remanded,* 352 U.S. 315 (1957), *on remand,* 166 F. Supp. 373 (W.D. Wash. 1958), *vacated and remanded,* 284 F.2d 326 (9th Cir. 1960), *reh. denied,* 289 F.2d 924 (9th Cir. 1961).

Of course, lack of subject matter jurisdiction cannot be conferred on a federal court by a waiver or stipulation of a party. *See e.g., California v. La Rue,* 409 U.S. 109 (1972). Therefore, to the extent that the discretionary function exception is jurisdictional, concessions or silence by the parties should not have precluded this Court from reviewing the issue independently in each of these cases. Thus, it is appropriate to assume that this Court considered the discretionary function exception to be inapplicable to them.

In short, the language in *Dalehite* lends itself to different interpretations. Although an all-encompassing application of discretionary function exception may be a possible lesson of the case, the lower courts have vigorously argued such an interpretation is untenable:

> The description of a discretionary function in *Dalehite* permits the interpretation that any federal official vested with decision-making power is thereby invested with sufficient discretion for the government to withstand suit when those decisions go awry. Most conscious acts of any person whether he works for the government or not, involve choice. Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions.
>
> If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents . . . the federal courts must reject an absolutist interpretation of *Dalehite*. . . .

Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967), *cert. denied,* 389 U.S. 841 (1967) (Judge Goldberg).

2. A Hopeless Split Among the Circuit Courts of Appeals Exists.

A. All-encompassing Interpretation of Discretionary Theory.

As a result of the difference of opinion regarding the proper interpretation of the language in *Dalehite*, the circuit court decisions have been conflicting. The decisions seek to find a dividing line between a discretionary decision and its performance, however "no rule has ever been stated as to why the (discretionary exception) was applied in some cases and not others." Reynolds, "The Discretionary Function Exception of the Federal Tort Claims Act," 57 *Georgetown L.J.* 81, 90 (1968) (hereafter "Discretionary Function Exception").

Some courts have found an all-encompassing interpretation of "discretionary" irresistible. *Wright v. United States*, 568 F.2d 153 (10th Cir. 1977); *Bryant v. United States*, 565 F.2d 650 (10th Cir. 1977); *First Nat. Bk. in Albuquerque v. United States*, 553 F.2d 370 (10th Cir. 1977). *Accord, Ashley v. United States*, 215 F. Supp. 39 (D. Neb. 1963), *aff'd*, 326 F.2d 499 (8th Cir. 1964), *but see, Dahlstrom v. United States*, 223 F.2d 819 (8th Cir. 1956). *See, generally*, "Discretionary Function Exception," at 108-10. For example, *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953), applied a broad application of the exception, holding that the decision to use a certain herbicide to destroy willows on government-controlled land was within the exception. Moreover, *Harris* implies that any decision made in the planning of an activity by a person who was originally involved in the planning will be within the exception, even if the decision concerns only detail of execution. 205 F.2d at 766-67.

B. Planning/Operational Distinction Theory.

In contrast to the broad interpretation of the discretionary function exception, a majority of the circuit courts have applied a more restrictive interpretation generally labeled as a planning/operational distinction. "Discretionary function exception," at 103-07. *See, e.g., Miller v. United States,* 583 F.2d 857 (6th Cir. 1978); *Driscoll v. United States,* 525 F.2d 136 (9th Cir. 1975); *Hendry v. United States,* 418 F.2d 774 (2d Cir. 1969); *White v. United States,* 317 F.2d 13 (4th Cir. 1963); *Mahler v. United States,* 306 F.2d 713 (3d Cir. 1962), *cert. denied,* 371 U.S. 923 (1962); *American Exch. Bank of Madison, Wis. v. United States,* 257 F.2d 938 (7th Cir. 1958); *Fair v. United States,* 234 F.2d 288 (5th Cir. 1956); *Dahlstrom v. United States,* 228 F.2d 819 (8th Cir. 1956); *Eastern Air Lines, Inc. v. Union Trust Company,* 95 U.S. App. D.C. 189, 221 F.2d 62 (D.D.C. 1955), *aff'd mem.,* 350 U.S. 907 (1955).

The planning/operational distinction does not provide a clear definition of the parameters of the discretionary function exception. Indeed, a careful reading of the leading cases that apply the method shows they supply no clear test at all. "Discretionary function exception," at 104. Yet, certain general rules emerge from the text of the decisions applying the planning/operational distinction. Where no evaluation of broad policy factors is necessary and decisions concern routine, everyday matters, the exception will normally be applied. *Swanson v. United States,* 229 F. Supp. 217 (N.D. Cal. 1964). Similarly, a decision to apply a broad policy in a specific case is not within the exception, as the discretion is considered exhausted by the original adoption of a particular policy. "Discretionary function exception," at 106.

Driscoll v. United States, 525 F.2d 136 (9th Cir. 1975), is an example of this restrictive reading of the discretionary

function exception under the planning/operational analysis. Driscoll had based his claim for injuries incurred in an automobile accident while crossing the street on Luke Airforce Base, Arizona, on the failure to install warning devices, barriers and speed control devices or crosswalks. The United States argued such design choices or traffic control were protected from review of a civil action under the discretionary function exception. 525 F.2d at 137. But, giving little deference to the United States argument, the Ninth Circuit Court of Appeals held the record could support a conclusion that the decision not to install appropriate warning devices, barriers, speed control devices or crosswalks was made at an operational level; the decision fell outside the protection of the discretionary function exception. 525 F.2d at 138.

C. "Good Samaritan" Theory.

Intertwined with the planning/operational analysis are a line of cases that apply the "good samaritan" rule. "Discretionary function exception," at 107. The rule is that once a task is undertaken by the government it must be performed with due care. *Pierce v. United States*, 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956). The "good samaritan" cases are a product of the language of this court's decision in *Indian Towing v. United States*, 350 U.S. 61 (1955). Judge Frankfurter said:

> The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good samaritan" task in a careful manner.

350 U.S. at 64-65.

The results under the good samaritan rule and the planning/operational analysis are similar: formulation of a general plan is within the exception; application of the plan to individual situations usually is not. "Discretionary function exception" at 107. Like the planning/operational analysis, the good samaritan rule restrictively interprets the governmental function exception. *E.g., Pierce v. United States, supra; Fair v. United States,* 234 F.2d 288 (5th Cir. 1956); *United States v. White,* 211 F.2d 79 (9th Cir. 1954).

D. The Fifth Circuit Court of Appeals' Theory.

Notwithstanding a majority of the Circuit Courts of Appeals apply a planning/operational type analysis, dissatisfaction with the analysis has been voiced. Perhaps in the forefront of this criticism is the Fifth Circuit Court of Appeals. That court characterizes the analysis as conclusionary and generally unaiding in the process of analysis. *Payton v. United States,* 636 F.2d 132, 138 (5th Cir. 1981).

> (The planning/operational analysis) may be a makeweight in easy cases where of course it is not needed, but in difficult cases it proves to be another example of a distinction "so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation." Mr. Justice Frankfurter for the Court in *Indian Towing, supra,* 350 U.S. at 68, 76 S. Ct. at 126, 100 L.Ed. at 55. Such statutory "aids" to construction tend to obscure, to limit, or even replace the standards whose meanings they are supposed to clarify. (Citations omitted) It must be remembered that the question at hand here is the nature and quality of the discretion involved in the acts complained of.

Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967), *cert. denied,* 389 U.S. 841 (1967).

In part, in answer to this criticism the courts are creating new methods to describe the parameters of the discretionary function exception. Some courts discard the types of tests and analysis described above and, instead, attempt to develop factual similarities among the vast array of judicial precedent on the issue. *E.g., Bernitsky v. United States,* 620 F.2d 948, 951 (3d Cir. 1980). But, the Fifth Circuit Court of Appeals chose to strike new ground in the case of *Payton v. United States,* 636 F.2d 132 (5th Cir. 1981). In *Payton* a husband and children of a victim of a mutilating homicide sought relief against a federal prison and parole officials. The Federal District Court had held the decision to parole was discretionary and, therefore, the court lacked subject matter jurisdiction to hear plaintiff's claim for relief under the Federal Tort Claims Act. The Fifth Circuit Court of Appeals reversed; it ruled "release in total disregard of known propensities for repetitive brutal behavior is not an abuse of discretion but rather an act completely outside of the clear statutory limitations." 636 F.2d at 146. In reaching its conclusion the court enunciated relevant criteria to be weighed by trial courts in the context of the circumstances of each case, with the object of protecting each policy consideration raised by the existence of the discretionary function exception. The factors enunciated were identical to those recommended by Professor Jaffe in his article, Jaffe, "Suits Against Governments And Officers: Damage Actions," 77 *Harv. L. Rev.* 209, 219 (1963). 636 F.2d at 143-45. These factors are the following: the character and severity of plaintiff's injury; the expectation of the public or injured party and nature of reliance, whether based upon consistent level of governmental activity or upon the parties lack of foresight; the existence of alternative remedies; the effect on the nature and quality of the governmental activity causing the injury; and the court's capacity for deciding the case *i.e.,*

whether the factors for decision are primarily of such political, social or economic nature as to be beyond the court's experience. *Id.* The *Payton* case denotes a restrictive view of the discretionary function, as a first blush analysis of a parole board's decision making would characterize it as discretionary. Nevertheless, *Payton* is now illustrative of the Fifth Circuit Court of Appeals' balance of the policy considerations raised by the exemption in the statute designed to ease the burden of governmental injury on citizens, in juxtaposition to the exemptions policy, to prevent judicial review of political questions.

E. The Different Theories and Application of These Theories Have Resulted in Conflicting Rulings.

As a consequence of the variety of approaches throughout the Circuit Courts of Appeals and the absence of a definitive ruling by this Court there has been "a considerable amount of difficulty, recognized by both the courts and the commentators, in applying the discretionary function exception." *Bernitsky v. United States,* 620 F.2d 948, 951 (3d Cir. 1980). The net result of the difficulties has resulted in courts reaching different conclusions as to the applicability of the exception on the same or similar facts. *Compare, e.g., Ashley v. United States,* 215 F. Supp. 39 (D. Neb. 1963) (field decision how to handle a troublesome bear in a national park protected by discretionary function exception), *aff'd,* 326 F.2d 499 (8th Cir. 1964), *with Downs v. United States,* 522 F.2d 990 (6th Cir. 1975) (F.B.I. agent's decision how to handle an airplane hijacking not a protected act of discretion) *and Miller v. United States,* 410 F. Supp. 425 (E.D. Mich. 1976) (negligent operation of waterworks protected by discretionary function exception), *modified,* 583 F.2d 857 (6th Cir. 1978), *with Ingham v. Eastern Air Lines, Inc.,* 373 F.2d 227 (2d Cir. 1967) (negligent operation of airport control

tower not a protected act or discretion), *cert. denied,* 389 U.S. 931 (1967), *and Miller v. United States,* 522 F.2d 386 (6th Cir. 1975) (government not liable for discretionary decision in not adopting stricter air safety regulations), *with White v. Trans World Airlines, Inc.,* 320 F. Supp. 655 (S.D. N.Y. 1970) (dicta suggesting U.S. might be held liable if the FAA issued regulations "so inadequate to assure safe flight that supplemental services should have been provided"), *and Monarch Insurance Co. of Ohio v. District of Columbia,* 353 F. Supp. 1249 (D.D.C. 1973) (cause of action based on alleged negligence of Government to suppress riot or civil disturbance in D.C. protected by discretionary function exception), *with Swanner v. United States,* 309 F. Supp. 1183 (M.D. Ala. 1970) (cause of action for death by failure to provide protection to IRS informant not protected by discretionary function exception). A review of the case law for a standard or coherent set of principles that might govern the application of the discretionary function exception reveals not a seamless web, but a patchwork quilt. *Blessing v. United States,* 447 F. Supp. 1160, 1167 (E.D. Pa. 1978).

3. The Developing Rule That a Failure to Warn of Known Dangers or Hazardous Conditions Is Without the Discretionary Exception Has Never Been Before This Court.

Apart from the judicial interpretations of the discretionary function exception arising from the language in this Court's decision in *Dalehite,* a line of cases exists that interprets a failure to warn of known danger or hazards as being beyond the scope of the discretionary function exception. This line of cases reasons the Government cannot rationally be deemed to exercise discretion in a failure to warn of a known danger or hazardous condition. *E.g., Smith v. United States,* 546 F.2d 872 (10th Cir. 1976);

Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971); *United States v. State of Washington*, 351 F.2d 913 (9th Cir. 1965); *United States v. White*, 211 F.2d 79 (9th Cir. 1954); *Foster v. United States*, 183 F. Supp. 524 (D. N.M. 1959), *aff'd per curiam*, 280 F.2d 431 (10th Cir. 1960); *Bulloch v. United States*, 133 F. Supp. 885 (D. Utah 1955); *Worley v. United States*, 119 F. Supp. 719 (D. Or. 1952). This Court has never ruled on the applicability of the discretionary function exception to a duty to warn of hazardous or known dangers. These cases illustrate the struggle of the lower courts to define the discretionary function exception of the Federal Tort Claims Act.

4. Conclusion.

The case at bar illustrates the difficulty the circuit courts have had in applying the discretionary function exception. In a two to one majority the Tenth Circuit Court of Appeals held the government's accumulation, standardization, and distribution of the inaccurate and dangerously misleading symbolic information in the Wichita aeronautical section chart was protected by the discretionary function exception. This decision follows an expansive construction of the exception that the Tenth Circuit Court of Appeals has adhered to for a number of years. By contrast to the majority, Judge Doyle's dissent accepts and applies the planning/operational analysis. Additionally, the dissent applies the rule that discretionary function exception does not protect a breach of the government's duty to warn of known dangers or hazardous conditions.

The distinctions made by the Tenth Circuit Court judges of cases with analogous facts to the case at bar are particularly illustrative of the conflicting results that may be reached by a court applying different types of analysis to define the parameters of the discretionary exception. The majority finds great importance in character-

izing the negligence alleged in the analogous cases as attendant to "mechanical preparation as distinguished from the substance of . . . design." In comparison, Judge Doyle's dissent gives little credence to the majority's distinction. "[J]ust because the preparation for the day of decision on the airfield occurs away from the field does not mean that the handiwork of those who have prepared the chart can be regarded as all part of the discretionary effort. There cannot be a discretionary effort which authorizes the commission of palpably negligent acts. The discretionary effort is *to do* some general task which is required because of or in spite of its policy ramifications." The dissent also applies the "hazardous activity rationale." It maintains warning "as to the existence of known dangers or hazardous conditions, when it would have been very easy to have done so, cannot be considered the exercise of a discretionary function. Surely the United States is not going to exercise discretion by deciding to create a hazard."

The results of the Tenth Circuit Court of Appeals' majority opinion would have been different had it applied the tests the dissent accepted in analyzing the breadth of the discretionary function exception. The results also would have been different had the Fifth Circuit factor analysis been applied. In *Payton v. United States*, 636 F.2d 132 (1981), the exercise of discretion by a parole board seems no less than the discretion exhibited by the scribner of an aeronautical chart. Certainly, as in *Payton*, the loss complained of is an isolated physical impairment. Pilot Baird had relied on the accuracy of the aeronautical chart published by the Government. The petitioners are faced with a dearth of alternatives to remedy the injury suffered. The activity the Government was involved in - chart making - is not one fraught with political or policy

overtones such as the feasibility of practicality of a program. Lastly, a tort suit provides a relevant standard of care, a duty to warn of known or hazardous defects and a duty to act as would a reasonable prudent person. *See Payton*, 636 F.2d at 143-45.

The case at bar illustrates the conflict in interpretation throughout the Circuit Court of Appeals and provides this Court the opportunity to give the direction the lower courts need to correctly interpret the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. §2680 (a). This Court can decide the Government's duty to warn of known dangers or hazardous conditions. This Court can define the proper balance between the policies of remedying wrongs and avoiding judicial interference in political-type questions.

For these reasons, writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

By: W. A. KAHRS
of KAHRS, NELSON, FANNING, HITE & KELLOGG
Attorney for Petitioners

APPENDIX

(Filed July 23, 1981)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY TERM - June 29, 1981

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

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No. 79-1197
(D.C. No. 78-4180)

GALEN J. BAIRD,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA,
Defendant-Appellee,

CAPITOL AIR SERVICE, INCORPORATED,
and VANGUARD INSURANCE COMPANY,
Intervenors-Appellants.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

(Filed June 29, 1981)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1197

GALEN J. BAIRD,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

v.

CAPITOL AIR SERVICE, INC. and
VANGUARD INSURANCE COMPANY
Intervenors-Appellants.

And

No. 79-1441

CAPITOL AIR SERVICE, INC. and
VANGUARD INSURANCE COMPANY
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. Civ. 78-4180 and 78-4173)

Alan L. Rupe of Kahrs, Nelson, Fanning, Hite & Kellogg, Wichita, Kansas (Meryl D. Wilson of Stites, Hill & Wilson, Manhattan, Kansas, and Darrell D. Kellogg of Kahrs, Nel-

son, Fanning, Hite & Kellogg, Wichita, Kansas, with him on the brief), for Appellants.

James P. Buchele, United States Attorney, Topeka, Kansas, for Defendant-Appellee.

Before BARRETT, DOYLE, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

This is a consolidated appeal after dismissal of a Federal Tort Claims suit under 28 U.S.C. §§ 1346(b), 2671-2680,[1] against the United States for damages that resulted when a small aircraft crashed off the runway at the Paul Windle Airport in Kansas. The claimants are pilot Galen Baird, his employer Capitol Air Service, Inc., and its insurer Vanguard Insurance Co. (collectively "plaintiffs"). They

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1. Section 2674 provides in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

28 U.S.C. § 2674. The jurisdictional counterpart in section 1346(b) says:

> "Subject to the provisions of chapter 171 of this title [28 U.S.C. §§ 2671-2680], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Id. § 1346(b).

claim that the Government published a misleading aeronautical chart that caused Baird to overestimate the length of a lighted runway on the evening of the crash. The district court dismissed for lack of subject matter jurisdiction after concluding that the chart's issuance fell within the discretionary-function exception of 28 U.S.C. § 2680 (a)[2], and that sovereign immunity therefore barred the claim. We affirm.

The parties do not dispute the material facts. At approximately 9:30 p.m. on July 27, 1976, Baird and three passengers flew in Kansas from Ulysses to Greenburg. The group traveled in a Piper Seneca, a small aircraft. In making his landing approach at Greenburg's Paul Windle Airport, Baird used the Wichita Sectional Aeronautical Chart (16th ed., June 17, 1976). The symbols

PAUL WINDLE

2230-L-28

appeared on the chart. According to the chart's legend, "PAUL WINDLE" symbolized the name of the airport. The "*2230*" indicated "Elevation in feet [above sea-level]." The "28" described the "Length of longest runway in hundreds of feet." Finally, the symbol "L" was to be interpreted according to the following legend:

"L - Lighting in operation Sunset to Sunrise.

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2. Section 2680(a) provides in pertinent part:

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

28 U.S.C. § 2680(a).

*L - Lighting available Sunset to Sunrise only on request (by radio call, letter, phone, telegram).

(L) - Lighting in operation part of the night and on request, or not operating thereafter. When facility or information is lacking, the respective character is replaced by a dash."

Rec., supp. vol. II.

From the sectional chart, then, Baird could infer that runway lights would be on at Paul Windle Airport from sunset to sunrise. And in fact, they were. But Baird inferred, in addition, that the runway lights he saw from the air marked off Paul Windle's longest runway whose length in hundreds of feet was reflected in the "28" symbol. Unfortunately, the lighted runway was not Paul Windle's longest. It was a shorter one only 2,580 feet long. Moreover, that runway was lighted for only 2,176 of its 2,580 feet. The aircraft overran the runway and crashed. Two passengers were killed, the third and Baird severely injured.

The Wichita sectional chart expressly states that it was "published in accordance with Inter-Agency Air Cartographic Committee specifications." Rec., supp. vol. II. This Committee, commonly known as the IACC, was created by agreement of the Department of Defense, the Federal Aviation Administration, and the Commerce Department. These three federal agencies intended the IACC to "develop the final detailed and authoritative specifications for the actual flight information materials (both textual and chart forms) which will constitute the official operative materials produced or used by Government agencies," Rec., vol. IV, at 1, subject to the agencies' review and approval.

Rec., vol. IV, at 5. Once approved, the specifications would become binding. *See id.*[3]

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3. More fully, the inter-agency agreement described the IACC's purpose and authority as follows:

"*PURPOSE*

The purpose of the Inter-Agency Air Cartographic Committee (IACC) is twofold:

1. First, to develop those final chart and textual material specifications which will provide acceptable flight information materials for operation in the airspace and for adequately controlling operations in that airspace. Since there may be individual differences in acceptable final specifications for civil and governmental airspace operations, there may be more than one set of final specifications arrived at by the IACC, although it will be a prime objective to reduce or eliminate such differences. In every case, it is mandatory that the minimum standards referred to earlier be an integral part of the final specifications.

2. Second, to ensure that flight information materials necessary for the fulfillment of the operational requirements of users are produced at minimum cost and with no unnecessary duplication.

". . . .

"SCOPE OF AUTHORITY

The IACC is empowered to develop the authoritative final specifications for flight information materials. It is empowered to continuously review and update those final specifications on the basis of changing needs or roles of the governmental organizations concerned. It will be the intent of the IACC to foster the maximum desirable standardization of flight information materials, consonant with the operational requirements, of the user agencies. Whatever the final form of these textual and chart materials, they will constitute the authoritative information by means of which Governmental users operate in the airspace. Further, it will assist in the Government control of the operations in that airspace.

". . . .

"*INTENT AND DURATION*

1. The IACC is an authoritative decision-making body whose members can speak for, and commit, their agencies to actions resulting from the IACC's continuing reviews and evaluations. All decisions of the IACC will be subject to the review and approval of the agencies concerned. Subsequent to this review and approval, the decisions of the IACC will be binding on the agencies concerned."

Rec. vol. IV, at 1-2, 5.

In exercise of its authority, the IACC promulgated specifications, which pertinently provide:

"(5) The airport name shall be supported by the following coded data, positioned immediately above, following or below the airport name as indicated. A dash shall be substituted for the elevation, lighting, or runway length when not shown.

". . .

"(e) Lighting symbolization shall indicate the availability of runway lighting to facilitate night landings, and shall be shown below the airport name following the elevation. Runway lighting is defined as a system of lights which defines the useable runway surface and includes lateral lights, referred to as runway lights which mark the sides of the runway, and threshold lights which mark the ends. Lighting in operation sunset to sunrise shall be indicated by the letter 'L.' Lighting available sunset to sunrise only on request (by radio call, letter, phone, telegram) shall be indicated by an asterisk (*) preceding the letter 'L.' Lighting on and operating part of the night and on request, or not operating thereafter, shall have the letter 'L' in parenthesis, e.g. (L). The absence of a night landing capability shall be indicated by a short dash in lieu of the letter 'L.'

"(f) The runway length shall be positioned below the airport name following lighting. Runway length shall be the actual length of the longest active runway (pavement, end to end), including displaced thresholds, but excluding those areas designated as overruns. Runway length shall be shown to the nearest 100 feet using 70 as the

> division point; e.g., 59 shall be used to indicate a runway of 5,870."

Rec., vol. V, at 94-95.

The "PAUL WINDLE/2230-L-28" symbols on the Wichita sectional chart are in literal compliance with the quoted specifications. Lights *were* on sunset to sunrise and the longest runway *was* 2,800 feet. Nevertheless, plaintiffs contend that the Government should be liable for the chart's failure to tell pilot Baird that the longest runway to which the "28" symbol referred was not the runway to which the lighting symbol "L" referred, and that the shorter runway was lit for only 2,176 of its 2,580 feet. They argue that the discretionary-function exception of 28 U.S.C. § 2680(a) does not apply to the Government's "accumulation, standardization, publication and distribution of inaccurate and misleading symbolic information" in the Wichita sectional chart. Appellants' Brief at 1-2. We are compelled to disagree.

Section 2680(a), like every other exception in 28 U.S.C. § 2680, limits the Government's waiver of sovereign immunity. It therefore poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction. *See First National Bank v. United States*, 552 F.2d 370, 374 (10th Cir.), *cert. denied*, 434 U.S. 835 (1977); *Smith v. United States*, 546 F.2d 872, 875-76 (10th Cir. 1976); *cf. United States v. Kubrick*, 444 U.S. 111 (1979) (time limitation on sovereign's consent to suit; 28 U.S.C. § 2401(b)); *Knapp v. United States*, 636 F.2d 279 (10th Cir. 1980) (same; 28 U.S.C. § 2409a(f)). Thus, to test the district court's jurisdictional dismissal, we must determine whether plaintiffs have challenged a "discretionary function or duty." 28 U.S.C. § 2680(a). But we need not wallow too long in the guagmire of what makes a governmental func-

tion discretionary or nondiscretionary, *see generally Allnutt v. United States*, 498 F.Supp. 832, 835-36 (W.D. Mo. 1980); *Blessing v. United States*, 447 F.Supp. 1160, 1167-85 (E.D. Pa. 1978), for we believe plaintiffs' claim falls squarely within the bar of section 2680(a).

Plaintiffs state their claim in terms of the Government's publishing misleading information on the Wichita sectional chart. In essence, they argue the Government could have avoided ambiguity altogether by providing information on the chart to correlate the longest-runway symbol to the available-lighting symbol. But whatever ambiguity inheres in the chart's symbols is traceable to the very terms of the specifications as developed by the IACC. *See* pp. 3-4 *supra*. If there is a flaw in the chart, it is a flaw in the design of the IACC specifications themselves, for the chart's symbols are the specifications incarnate. Plaintiffs do not controvert the Government's contention that it has never undertaken

> "to indicate on its sectional aeronautical charts which runway at every airport has lights, how much of each runway is lit or the length of each runway. It would be virtually impossible to provide all data available for a particular airport with any clarity without causing a clutter situation on the sectional chart."

Rec., vol. I, at 27. For all that plaintiffs have asserted, they seek redress for the IACC's decision to not require more detailed information on aeronautical charts such as the Wichita sectional chart. Their suit amounts to a challenge of the IACC's decision on how much possible ambiguity it was willing to tolerate from lack of detail on sectional aeronautical charts, in favor of other policy goals such as chart clarity. The IACC could well have decided that its sectional charts would provide pilots certain minimum information, leaving to the pilot the responsibility of further

inquiry for details from other sources available to him. In our view, this is precisely the kind of discretionary judgment that Congress in section 2680(a) meant to shield from suit: "determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953). The principle upon which section 2680(a) rests appeared early and succinctly in our jurisprudence, when Chief Justice John Marshall said:

> "It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction [to review the executive's discretionary functions]. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Unlike cases relied upon by plaintiffs to support their claim, we do not have here a situation where negligence has attended the mechanical preparation, as distinguished from the substance of the design, of an aeronautical chart. *See, e.g., Reminga v. United States*, 631 F.2d 449, 451-52 (6th Cir. 1980) (TV tower's ground location depicted inaccurately on chart); *Allnutt v. United States*, 498 F.Supp. 832, 835 (W.D. Mo. 1980) (failure of chart to depict existing power transmission line). Neither is this a situation where use of the *wrong* lighting symbol caused the chart to expressly contradict conditions on the ground. *See, e.g., Murray v. United States*, 327 F.Supp. 835, 839, 841 (D. Utah 1971) (chart symbols and other information indicated lighting available throughout night or in any event upon aircraft's circling field; pilot unable to get

lights on even after circling field), *aff'd*, 463 F.2d 208 (10th Cir. 1972); *Sullivan v. United States*, 299 F.Supp. 621, 625 (N.D. Ala. 1968) (use of "L" symbol where "*L" called for led pilot to expect lights on from sunset to sunrise, but when arrived during night flight, found lights off), *aff'd*, 414 F.2d 794 (5th Cir. 1969). Finally, we do not have a situation where negligence is confined essentially to the operation of a government facility or enterprice. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 62 (1955) (negligent repair and maintenance of government lighthouse); *Smith v. United States*, 546 F.2d 872, 874-75 (10th Cir. 1976) (negligent failure to post signs to warn of superheated thermal pools in Yellowstone National Park); *Yates v. United States*, 497 F.2d 878, 882 (10th Cir. 1974) (FAA air controller's negligent failure, while directing air traffic, to provide adequate separation between aircraft); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 392-98 (9th Cir.) (negligent operation and use of Air Force pilot training procedures that disregarded Air Force regulations), *cert. dismissed*, 379 U.S. 951 (1964). The negligence in all these cases did not relate to discretionary or judgmental activities by the Government, so section 2680(a) did not apply.

From the last four cases cited above, the dissent concludes that the discretionary-function exception does not cover the IACC's decision in this case on how detailed to make the runway lighting information in charts such as the Wichita sectional. In the dissent's view, the lack of detail here amounts to an actionable breach of duty by the Government to warn of dangers. We do not believe, however, that the breach of duty in the course of the operational activities found actionable in those cases can be properly likened to the IACC's discretionary design choices challenged here. It is important to note that plain-

tiff's challenge goes only to the Wichita chart. And no defect is claimed in that chart apart from the IACC specifications to which it conforms. In actuality, the challenge applies to the design of *all* sectional charts. Viewed in its essence, plaintiffs' claim is that the Wichita chart and all others like it should provide more detailed and hence more accurate information.

Simply put, plaintiffs challenge the Wichita sectional chart because it was too sketchy. This challenge thus goes to the heart of the IACC's deliberative and judmental activities in designing and approving the extent of detail to be included in aeronautical sectional charts versus the extent of detail left to be gleaned from other sources that the prudent pilot can be expected to consult. Such design and approval activities or choices by the Government fall within the discretionary-function exception and are not actionable under the Federal Tort Claims Act. *See, e.g., Reminga v. United States,* 631 F.2d 449, 454-56 (6th Cir. 1980) (activity in designing FAA regulations that do not require lighting or other warning markers on tower guy wires); *Wright v. United States,* 568 F.2d 153, 154 (10th Cir. 1977) (activity of Interior Department in designing approach roads to bridge), *cert. denied,* 439 U.S. 824 (1978); *First National Bank v. United States,* 552 F.2d 370, 376 (10th Cir. 1977) activity of Agriculture Department in devising warning labels for pesticides and investigating dangers connected with prior use of such pesticides); *Miller v. United States,* 522 F.2d 386, 387 (6th Cir. 1975) (failure to adopt more strict air safety regulations); *Spillway Marina, Inc. v. United States,* 445 F.2d 876 878 (10th Cir. 1971) (policy decision to lower reservoir's water level created alleged need to give warnings; *held* Government's omission within discretionary-function exception and not negligence at operational level). *See also Payton v. United States,* 636 F.2d 132, 146-47 (5th

Cir. 1981); *Green v. United States*, 629 F.2d 581, 585-86 (9th Cir. 1980). Contrary to the dissent, we believe that the IACC's activities here are more analogous to those in cases like *Reminga*, *Wright*, *First National*, *Miller*, and *Spillway*, than to the operational activities in *Indian Towing*, *Smith*, *Yates*, or *United Air Lines*. We must therefore affirm the district court's dismissal of plaintiffs' claim.[4]

Affirmed.

No.79-1197 and 79-1441, Galen J. Baird v. United States v. Capitol Air Service, Inc., et al.; Capitol Air Service, Inc., et al. v. United States

Dissent by Judge Doyle

I respectfully dissent:

Involved here are two cases arising out of a single incident, which cases were brought under the Federal Tort Claims Act in the United States District Court for the District of Kansas. The one action is by a pilot, one Baird, employed by Capitol Air Services, Inc. In the other action the intervenor, the workmen's compensation insuror, has asserted a subrogation claim seeking damages from the United States for the alleged negligent Accumulation, Standardization, Publication and Distribution of Information in the Wichita aeronautical sectional chart, specifically the Paul Windle Airport in Greensburg, Kansas. The trial court dismissed the action holding that the government's acts fell within the protected exception of the Tort Claims Act inasmuch as it was a discretionary function that was being carried out; that therefore the United States District Court lacked subject matter jurisdiction over the cause.

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4. This dismissal does not foreclose all relief for plaintiffs. They are free to seek private relief through congressional action.

This was a small aircraft which was being piloted by Baird, who was very seriously injured in the accident. Two of his three passengers were killed.

The United States government's Inter-Agency Cartographic Committee, under the direction of the Federal Aviation Agency, the Department of Defense, and the Department of Commerce, prepared charts and updated the same providing flight information materials. The charge here is that the United States through the IACC published incorrect and misleading information regarding the Paul Windle Airport, and at the same time failed to warn appellant of this; that this incorrect information was the proximate cause of the accident involved in this case and of the appellant's damages. Specifically, appellant maintains that the chart failed to inform him that the longest runway at that airport was not the lighted runway, and the shortest runway was not lighted in its entirety. Nevertheless, the trial court dismissed the case without any trial and so ruled on the conclusion that there was a lack of subject matter jurisdiction (which has been mentioned). So, basically the question here is whether the trial court erred in finding that the defendant's failure to warn the plaintiff of the true condition constituted a decision protected by the discretionary function doctrine.

The asserted defense arises under 22 U.S.C. § 2680 which sets a number of exceptions to the Federal Tort Claims Act. It provides:

> "the provisions of this chapter * * * do not apply to -
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused."

The trial court's holding is predicated upon the Supreme Court's decision in Dalehite v. United States, 346 U.S. 15, 35-6 (1943). That decision did construe the discretionary function provision and held that it included "determinations made by executives or administrators establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." The trial court held that the IACC specifications do not require that the government should provide information regarding lighting on runways other than the times of operation and general availability, and therefore that jurisdiction must be predicated on the formulation of aeronautical specifications falling outside the "discretionary function" exception. The court also held that the preparation and promulgation of acceptable flight information by the IACC was an activity calling for the exercise of policy judgment and decision, and thus it fell within the definition of a discretionary function under Dalehite, *supra*.

I respectfully disagree with the majority decision.

The contention of appellant is that the United States had a duty to accurately represent those features of the chart which it undertook to depict. Appellant cites several cases for this proposition. However, the trial court found these cases inapplicable in that the information published [in those cases] failed to comply with the government's specifications, or the court found the government liable because a government employee at the airport was negligent, (or the government's instructions to the employee were negligent), or the court found the government liable for failure to exercise any discretion at all - rather than being liable for an action taken pursuant to the exercise of that discretion.

The trial court's further holding was that the plaintiff could not establish liability of the United States on a strict

liability theory for its conduct in relegating an ultrahazardous activity because the FTCA does not permit or authorize an imposition of strict liability of any sort upon the government. Laird v. Nelms, 406 U.S. 797 (1972) and Dalehite, *supra*. That was essentially the holding in the *Dalehite* case. The Supreme Court ruled that none of the employees of the government were negligent and that there was no basis in the Federal Tort Claims Act for holding the government liable on an ultrahazardous activity ground. I have no disagreement with this.

The argument of appellant is that the government's decision to not warn as to the existence of known dangers or hazardous conditions, when it would have been very easy to have done so, cannot be considered the exercise of a discretionary function. Surely the United States is not going to exercise discretion by deciding to create a hazard. The appellant relies on the decision in this court in Smith v. United States, 546 F.2d 872 (10th Cir. 1976). The trial court sought to distinguish *Smith* on its facts. It stated that in *Smith* the court found no connection between the discretionary decision to leave part of Yellowstone Park undeveloped and the decision not to warn plaintiff of superheated pools in the undeveloped area. In the instant case the court said the IACC had discretion, so it is maintained by appellee, to decide what should or should not appear on the aeronautical charts even though it was misleading to the point of creating a risk of harm.

Appellant maintains that in the instant case, as in *Smith*, the duty to warn of known hazards existed independent of the discretionary decision. In other words, the appellant contends that the discretion was exercised with respect to the decision to prepare the charts. This is quite another thing from the presence of the misleading information on the charts once they are prepared. Thus

the exception for discretionary decisions does not create immunity or exemption with respect to acts of negligence which were plain and which could have been easily avoided.

Perhaps the threshold issue in the case is whether the particular act of negligence here involved was a part of the policy decision-making or was more related to the operational activity. My reaction is that the activity here in the present case is closer to the operational level than it is to the planning function. I say that since it involved a negligent act it was not a permissible policy decision. Also it is more a part of operations in that the charts furnish information to the traveler by air to guide him in his landing in the same manner that an air controller would do if one were present. In this case there was no air controller so the pilot was at the mercy of the chart.

Our decision in Yates v. United States, 497 F.2d 878, involved the negligence of an air controller who ordered the pilot of a small airplane attempting a landing, to follow in the wake of a large TWA liner, a 707. The crash was caused by an encounter with wake turbulence at an insufficient altitude to recover before striking the ground. The court held that the United States was liable for the negligence of its airport personnel. We concluded that the negligence of the FAA controllers consisted of failing to provide adequate separation between the decedent's aircraft and the preceding TWA 707 transport aircraft.

The analogy between the air controller and the use of the chart as a guide to landing is not, of course, complete. If one is in touch with the tower, undoubtedly he is in a better position to know what the situation is. But that was not possible in the case at bar. The only information which was provided was the elevation of the airport in Greensburg, Kansas, the length of the longest runway in hundreds of feet and it then stated that lighting and

operation sunset to sunrise only on request by radio call letter phone telegram. The data does not include how many runways there are which are lighted and the length of the lighted runway. It only tells the pilot the elevation, the lighting and the longest runway's length. Therefore, Baird had the right to believe that there was only one runway which was 2800 feet in length and that it was lighted because that one was lighted when he started to land. Consequently, the chart, which was intended to guide an airplane into the airport, was highly misleading. It gave half of the information and the half which was not disclosed could have prevented the accident. Thus it was this neglect which was the proximate cause of running off the runway and crashing.

The Supreme Court decision in Indian Towing v. United States, 350 U.S. 61 (1955) bears some analogy to this present case in that there the question was one of failure to provide adequate lighting in the operation of a lighthouse. The allegation was that the tug Navajo, owned by Indian Towing Co., was towing a barge chartered by the petitioner, Upper Mississippi Towing Corp., which barge was loaded with cargo, and the tug went aground on Chandeleur Island. As a result sea water damaged the cargo. The action was against the government for failure to inspect the lighthouse so as to keep the light on, because it was the result of the lack of lighting that the ship went aground. In the opinion Justice Frankfurter said that the question was liability for negligence and what the court has characterized the "operational level" of governmental activity. It was contended that the Act had to read as excluding liability in the performance of activities which private persons do not perform. Thus, it was said, there would be no liability for negligent performance of uniquely governmental functions. Justice Frankfurter said:

> the government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual 'in the same circumstances'. But the statutory language is 'under like circumstances,' and it is hornbook tort law that one *who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner.* (emphasis supplied)

In the case at bar the activity of the government in preparing the chart could be regarded as an undertaking such as is spoken of in *Indian Towing.*

The court rejected the government's contention as to the boundaries of liability and said that the effort on the part of the government was to gauge liability as if the government were a municipal corporation and not as if it were a private person, and "it would thus push the courts," Justice Frankfurter said, "into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." After discussing the failure of the standard applicable to municipal corporations, the opinion concluded:

> The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts.

In rejecting the 'governmental'-'non-governmental' distinction the opinion stated:

> there is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so fine-spun and capricious as to be almost incapable of being in the mind for adequate formulation.

350 U.S. at 68.

The rationale for the Supreme Court's conclusion was that although the Coast Guard did not need to undertake

the lighthouse service, once it exercised its discretion to operate a light on the island and engendered reliance on the guidance afforded by the light, it was obligated to use due care in making certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and repair the light or give warning that it was not functioning. Its failure to perform this duty resulted in the injury to the parties involved.

The decision in *Indian Towing* gave only brief consideration to *Dalehite*. It merely said that "the governing factors in *Dalehite* sufficiently emerge from the opinion in that case."

It follows from the above that I see this case as one which arose not at some planning level, which is remote from the scene, but rather it emerged from continuing negligence in providing a chart which was incomplete but nevertheless persuaded people to depend upon it. It was not merely a sin of omission. Indeed, it contained misleading information and thus my view is that there is at least presumptive liability and there is jurisdiction. The facts do not rule it out on a jurisdictional basis. The case should be reversed and it should be tried.

I do not doubt that high level policy decisions, judgments and adjudications may well result in non-liability because this is in line with the exception that contemplates this kind of thing. But just because the preparation for the day of decision on the airfield occurs away from the field does not mean that the handiwork of those who have prepared the chart can be regarded as all part of the discretionary effort. There cannot be a discretionary effort which authorizes the commission of palpably negligent acts. The discretionary effort is *to do* some general task which is required because of or in spite of its policy

ramifications. Such a policy decision would be a change in the course of the Missouri River, Coates v. United States, 181 F.2d 816 (8th Cir. 1950), measures to protect migratory fowl, Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939, rehearing denied 342 U.S. 843, measures to conduct tests of nuclear explosions, Bartholomae Corp. v. United States, 135 F. Supp. 651 (S.D.Calif. 1955), *see also* a decision not to operate a seized coal mine is an exercise in discretion, Old King Cole Co. v. United States, 88 F.Supp. 124 (S.D. Iowa 1949), *see also* Prosser on Torts, 4th Ed., pp. 972-974.

Prosser, *supra*, declares there have been as many cases which have held that such operational exercise of discretion are not contemplated by the Act, and this seems definitely indicated by the position of the Supreme Court in Indian Towing Co. v. United States, *supra*. There is a good discussion of "discretionary" by the Ninth Circuit in United Air Lines, Inc. v. Wiener, 335 F.2d 379, 393, *cert. denied*, 379 U.S. 651. The language referred to is as follows:

> Discretionary to undertake fire-fighting, lighthouse, rescue, or wrecked-ship marking services, but not discretionary to conduct such operations negligently, discretionary to admit a patient to an Army hospital, but not discretionary to treat the patient in a negligent manner; discretionary to establish a post office at a particular location, but not to negligently fail to install handrails; discretionary to establish control towers at airports and to undertake air traffic separation, but not to conduct the same negligently; discretionary to reactivate an airbase, but not to construct a drainage and disposal system thereon in a negligent fashion; and discretionary for CAA to conduct a survey in low flying, twin-engine airplane, but not for pilots thereof to fly negligently.

A significant factor in *Dalehite* is its mention that none of the employees of the United States were negligent and that the United States could not be held liable based upon ultrahazardous activity where no one of its employees was guilty of negligence and where it exercised discretion in undertaking the activity. That certainly does distinguish the present case from *Dalehite*.

In summary the majority opinion declares that if the designers had sought to stop short of giving full information (in the chart), there is no liability because of the decision being made at the mapmaking level; they were at liberty to require the pilot to ask questions if he considered it to be necessary. I respectfully ask how could he make an inquiry if he did not know that the important information had been omitted from the chart? Thus if he holds the belief that all the information available has been provided and there has been a misleading omission, certainly he has been the victim of actionable negligence. The fact that he is engaged in a very dangerous activity, that is land airplanes at night, does not affect the recommended outcome of the case. It emphasizes the need to have exact information at the scene where it is known that the pilot is going to rely on the chart.

The presence of this general principle involving the exercise of discretion surely does not cover the multitude of sins which it seeks to cover here. It does not grant immunity for the creation of an unnecessary hazard, one which could have been easily avoided.

These, then, are my reasons for respectful disagreement with the majority opinion. Obviously, I would remand the case for a full scale trial in which the court makes the inquiries that are suggested and then addresses the merits.

(Filed January 3, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 78-4180

GALEN J. BAIRD,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM AND ORDER

This action arises out of an airplane accident at the Paul Windle Airport in Greensburg, Kansas, on July 27, 1976. The accident occurred when a Piper Seneca PA 34-200 piloted by plaintiff Galen J. Baird crashed off the airport runway. Plaintiff filed this action against the United States on June 6, 1978 seeking to recover damages under the Federal Tort Claims Act for injuries he sustained in and as a result of the crash.

The matter comes before the Court on the Government's motion to dismiss or, in the alternative, for summary judgment (Doc. 9). We have allowed Capitol Air Service, Inc. and Vanguard Insurance Company to intervene in this action (Doc. 8) and they join plaintiff in opposing the Government's motion (Doc. 15).

The motion reasserts the Government's contention, initially set forth in its answer, that suit against the United

States is barred by the "discretionary function" exception to the Federal Tort Claims Act. The parties have submitted extensive briefs, affidavits and exhibits in support of their various contentions. In addition to examining these materials, the Court has heard oral argument on the motion and conducted its own research into the applicable law. Because the case raises a question of first impression in this district over whether the activity involved falls within the "discretionary function" exception, we find it necessary to state in detail the basis for our decision.

I

Plaintiff contends the Government should be held liable for its publication of allegedly misleading information about the landing facilities available at the Paul Windle Airport. His claim involves the Wichita Sectional Aeronautical Chart, 16th Edition. The chart states that it was "published in accordance with Inter-Agency Air Cartographic Committee specifications and agreements approved by: Department of Defense * Federal Aviation Administartion * Department of Commerce." (Government Exhibit C.)

The named approving agencies of the United States Government by agreement in 1965 established the Inter-Agency Air Cartographic Committee (IACC) (Government Exhibit A). The agreement defined the IACC's purpose and authority as follows:

> "First, to develop those final chart and textual material specifications which will provide acceptable flight information materials for operation in the airspace and for adequately controlling operations in that airspace . . . ."

"Second, to ensure that flight information materials necessary for the fulfillment of the operational requirements of users are produced at minimum cost and with no unnecessary duplication."

"The IACC is empowered to develop the authoritative final specifications for flight information materials. It is empowered to continuously review and update those final specifications on the basis of changing needs or roles of the governmental organizations concerned. It will be the intent of the IACC to foster maximum desirable standardization of flight information materials, consonant with the operational requirements of the user agencies. Whatever the final form of these textual and chart materials, they will constitute the authoritative information by means of which Governmental users operate in that airspace. Further, it will assist in the Government control of the operations in that airspace."

"The IACC is an authoritative decision-making body whose members can speak for, and commit, their agencies to actions resulting from the IACC's continuing reviews and evaluations. All decisions of the IACC will be subject to the review and approval of the agencies concerned. Subsequent to this review and approval, the decisions of the IACC will be binding on the agencies concerned." (Government Exhibit A, pages 1, 2 and 5.)

Pursuant to this authority, the IACC prepared a publication entitled "United States Government Specifications for the Sectional Aeronautical/Tactical Pilotage/VFR Terminal Area Charts, 2d Edition" (February 1975). Insofar as those specifications are relevant to the case at bar, they provided as follows:

"(5) The airport name shall be supported by the following coded data, positioned immediately above, following or below the airport names as indicated. A dash shall be substituted for the elevation, lighting, or runway length when not shown.

(e) Lighting symbolization shall indicate the availability of runway lighting to facilitate night landings, and shall be shown below the airport name following the elevation. Runway lighting is defined as a system of lights which defines the usable runway surface and includes lateral lights, referred to as runway lights which mark the sides of the runway, and threshold lights which mark the ends. Lighting in operation sunset to sunrise shall be indicated by the letter 'L.' Lighting available sunset to sunrise only on request (by radio call, letter, phone, telegram) shall be indicated by an asterisk (*) preceding the letter 'L.' Lighting on and operating part of the night and on request, or not operating thereafter, shall have the letter 'L' in parenthesis, e.g. (L). The absence of a night landing capability shall be indicated by a short dash in lieu of the letter 'L.'

(f) The runway length shall be positioned below the airport name following lighting. Runway length shall be the actual length of the longest active runway (pavement, end to end), including displaced thresholds, but excluding those areas designated as overruns. Runway length shall be shown to the nearest 100 feet using 70 as the division point; e.g., 59 shall be used to indicate a runway of 5,870." (Government Exhibit B, pages 94 and 95.)

The Wichita Sectional Aeronautical Chart prepared under the foregoing specifications contained the following information on the Greensburg Airport:

According to the aerodrome data posted on the chart this meant the airport had lighting from sunset to sunrise and a longest runway of some 2,800 feet in length. (Government Exhibit C.)

The Government contends the information on the chart fully complied with the specifications of the IACC and that this Court lacks subject matter jurisdiction because the development of those specifications falls within the "discretionary function" exception to the Federal Tort Claims Act (Doc. 10). Plaintiff, on the other hand, contends the governmental activity in this case—the accumulation, standardization, publication and distribution of false and misleading symbology—falls outside the scope of the exception and that, even if it was a "discretionary function," the exception does not apply in situations involving a duty to warn of a life endangering peril (Doc. 14).

In reaching a decision on these issues, we need not consider the merits of plaintiff's claim of negligence and strict liability. The only real issue before the Court at this time is whether or not the exception applies. Thus, we shall proceed with an examination of the controlling law in an effort to determine the answer to the question presented.

II

The doctrine of sovereign immunity prevents suit against the United States in the absence of its consent. *Peterson v. United States,* 428 F.2d 368, 369 (8th Cir. 1970); *Wright v. United States,* 568 F.2d 153, 158 (10th Cir. 1977); *Morris v. United States,* 521 F.2d 872, 874 (9th Cir. 1975). The Federal Tort Claims Act, 28 U.S.C. Sections 1346, 2671-2678, provides that consent and waives immunity from

suit in a variety of tort actions. *United States v. Yellow Cab Co.*, 340 U.S. 543, 547, 71 S.Ct. 399, 95 L.Ed. 523 (1950); *Smith v. United States*, 546 F.2d 872, 876 (10th Cir. 1976).

Congress did not intend, however, for the waiver to be absolute and in 28 U.S.C. § 2680 set forth a number of exceptions where immunity continues to apply. Once a court finds a particular exception applicable, it must dismiss for lack of subject matter jurisdiction. *Smith*, supra; *First National Bank in Albuquerque v. United States*, 552 F.2d 370, 374 (10th Cir. 1977), *cert denied*, 434 U.S. 835 (1977); Fed.R.Civ.P. 12(h)(3). In making that determination, a court may consider materials outside of the pleadings. *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971); *Waldon v. Elrod*, 72 F.R.D. 5, 17 (W.D. Okla. 1976); *Kerr v. Raney*, 305 F.Supp. 1152, 1153 (W.D. Ark. 1969).

The burden of proof on a motion to dismiss for lack of subject matter jurisdiction is on the party asserting the existence of such jurisdiction which he must establish by a preponderance of the evidence. *McDonald v. General Mills, Inc.*, 387 F.Supp. 24, 32 (E.D. Cal. 1974); *Bellamy v. Department of Health, Education and Welfare*, 354 F.Supp. 1231, 1232 (N.E.Ill. 1972); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Wilson v. Pickens*, 444 F.Supp. 53, 55 (W.D. Okla. 1977). In the instant case the plaintiff has the burden and to keep this lawsuit viable must show that the action is not barred by an exception to the Tort Claims Act.

The exception relied on by the Government provides:

"The provisions of this chapter and section 1346(b) of this title shall not apply to -

> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

As interpreted by the United States Supreme Court in *Dalehite v. United States,* 346 U.S. 15, 35-36, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), a "discretionary function"

> ". . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, and specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."

Plaintiff contends the dissemination and publication of aeronautical data constitutes a "mandatory" as opposed to a "discretionary function." Furthermore, he contends the United States should be held liable because the chart failed to inform him (1) that the longest runway at the Paul Windle Airport was not the lighted runway and (2) that the shorter runway had lighting on only 2,176 of its 2,580 feet (Docs. 14, 15).

The Court finds that the IACC specifications do not require or even suggest the Government should provide this information. No mention is made of a requirement that the longest runway shown be the lighted runway or that symbols be adopted and used to show a limitation on lighting other than the times of operation and general availability. (See page 3 of this Memorandum.) There-

fore, the existence of jurisdiction depends on the formulation of aeronautical specifications falling outside of the "discretionary function" exception.

The record before the Court demonstrates, and the Court finds that the preparation and promulgation of accepted flight information materials by the IACC constituted an activity calling for the exercise of policy judgment and decision. The approving agencies did not limit the IACC's authority to the operational functions of aeronautical activity but empowered it *"to develop* the authoritative final specifications for flight information materials." (Emphasis added.) (See page 2 of this Memorandum.) Also, the inter-agency agreement refers to the IACC as a "decision-making body" which tends to negate any notion of its being purely an administrative arm of the agencies creating it. (See page 2 of this Memorandum.)

Nevertheless, plaintiff contends the United States has a duty, when accumulating information and preparing specifications related to the publication and dissemination of aeronautical charts, to accurately represent those features it attempts to portray (Doc. 14, page 5). The cases cited in support of this proposition can be distinguished from the instant case.

In *Murray v. United States,* 327 F.Supp. 835 (D.Utah 1971), aff'd 463 F.2d 208 (10th Cir. 1972), the U. S. Government Flight Information Publication indicated the Bryce Canyon Airport to have lighting in operation from sunset to sunrise when in fact lighting was only available on request or by circling the field. Unlike the case at bar, *Murray* involved a situation where the information published failed to comply with the Government's specifications. In addition, the Court of Appeals affirmed the decision on other grounds, i.e., the negligence of the Federal Aviation Administration employee attending the station,

and did not mention the trial court's finding that the dissemination and publication of false aeronautical information proximately caused the accident.

Much of the same problem existed in *Sullivan v. United States,* 299 F.Supp. 621 (N.D.Ala. 1968), aff'd per curiam 411 F.2d 794 (5th Cir. 1969) where the chart did not mean what it plainly indicated. Once again the chart showed the airport to have lighting in operation from sunset to sunrise when the airport operated under a different procedure providing a lighted runway only on request. The Court also found the Government negligent for stationing the operator of the Flight Service Station in a room so located and constructed that he could neither see nor hear the approaching aircraft.

We have examined the case of *Reminga v. United States,* 448 F.Supp. 445 (W.D.Mich. 1978). In that case, the court held the Government liable for its failure to mark guy-wires supporting a television tower even though no policy had yet been formulated requiring such markings to be made. The court found § 2680(a) inapplicable because for there to be a

> ". . . discretionary judgment exception, there must first be evidence of some exercise of discretion. . . . [Here] [t]here simply has been no agency action at all. It was the failure to exercise this discretion and not any exercise *per se,* which this court finds culpably negligent . . . ." 445 F. Supp. at 467-468.

Reminga seems to hold contrary to established authority including the express language of the statute and the *Dalehite* case, supra. 28 U.S.C. § 2680(a) expressly includes within its scope *"the failure* to exercise or perform a discretionary function or duty." [Emphasis added.] Furthermore, in *Dalehite v. United States,* supra, 346 U.S.

42, the Supreme Court rejected a contention that the failure to label fertilizer in such a way to warn of its combustible nature fell outside of the non-actionable activities of § 2680 (a). See also *First National Bank in Albuquerque*, supra, 552 F.2d 370 [labeling function held within the "discretionary function" exception].

Thus, it would appear suit against the United States cannot be maintained on the claim that it failed to enact a more comprehensive set of air safety regulations. In this respect we adopt the holding of *Miller v. United States*, 522 F.2d 386, 387 (6th Cir. 1975) that

> "[t]he discretionary function exception to the Federal Tort Claims Act precludes the imposition of tort liability on the claimed failure to impose a more strict set of air safety regulations."

See also *Marr v. United States*, 307 F.Supp. 930 (E.D. Okla. 1969).

Plaintiff's second contention concerns the applicability of the exception in situations involving a duty to warn of a life endangering peril (Doc. 14, page 16). In determining the applicability of the statutory exceptions, we must look not to the theory upon which plaintiff elects to proceed, but rather to the substance of the claims which he asserts. *Lambertson v. United States*, 528 F.2d 441, 443 (2nd Cir. 1976), cert. denied, 426 U.S. 921, 96 S.Ct. 2627, 49 L.Ed.2d 374 (1976); *Diaz Castro v. United States*, 451 F. Supp. 959, 963 (D.P.R. 1978). Plaintiff's second claim is in theory and in substance an attempt to hold the United States strictly liable for its conduct in regulating an ultra-hazardous activity. (See Doc. 1, pages 2, 3). He cannot prevail on this claim because the Federal Tort Claims act does not permit or authorize the imposition of strict liability of any sort upon the Government. *Laird v. Nelms*, 406 U.S. 797, 803 (1972); *Dalehite*, supra, 346 U.S. at 44-45.

Assuming plaintiff's claim does not depend upon strict liability but on a "negligent or wrongful act or omission" of an agency employee, our decision would remain unchanged. Unlike the Court of Appeals in *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976), we have found the activity involved herein to fall within the ambit of the "discretionary function" exception. In *Smith* the Court of Appeals found no connection between the discretionary decision to leave part of Yellowstone National Park undeveloped and the decision not to warn plaintiff of superheated thermal pools in the undeveloped area. This case, on the other hand, presents quite a different situation where the IACC had discretion, limited only by the approval of the member agencies, to decide what should or should not appear on the areonautical charts. As long as the decision called for the exercise of policy judgment or discretion, a claim involving the decision does not exist even if the discretion involved was abused. *Spillway Marina, Inc. v. United States*, 330 F.Supp. 611 (D.Kan. 1970), aff'd 445 F.2d 876 (10th Cir. 1971); *In re Air Crash Disaster Near Silver Plume, Colorado*, 445 F.Supp. 384, 400 (D. Kan. 1977).

III

Based on the record before us, we conclude that plaintiff has failed to establish by a preponderance of evidence the non-discretionary nature of the activity involved herein. Accordingly, we find that the "discretionary function" exception of Section 2680(a) applies and that the Court lacks subject matter jurisdiction over the plaintiff's claim against the United States. Our conclusion would be the same considering the Government's motion as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The foregoing shall constitute this Court's findings of Fact and Conclusions of Law as permitted by F.A.Civ.P. No. 52(a).

IT IS THEREFORE ORDERED that this action be dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 2nd day of January, 1979.

/s/ (Illegible)
Senior Judge, Assigned

Opposition

Office - Supreme Court, U.S.
FILED
DEC 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-637

In the Supreme Court of the United States

OCTOBER TERM, 1981

GALEN J. BAIRD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's determination regarding the amount of information to be included in a nationwide system of aeronautical maps falls within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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In the Supreme Court of the United States

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GALEN J. BAIRD, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A22) is reported at 653 F. 2d 437. The opinion of the district court (Pet. App. A23-A34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1981. The petition for a writ of certiorari was filed on September 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims

against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in pertinent part:

The provisions of this chapter and Section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT

1. In 1965, the Department of Defense, the Department of Commerce and the Federal Aviation Administration established the Inter-Agency Air Cartographic Committee (IACC) for the purpose of developing standardized flight information materials " 'at minimum cost and with no unnecessary duplication' " (Pet. App. A24-A25). In 1975, the IACC published a uniform set of specifications for aeronautical charts. Among the items included for standardized treatment were the elevation of all airports, the length of the longest runway at the airport and whether runway lights are available.

The maps created by the government in accordance with the specifications do not purport to be exhaustive; indeed, they caution pilots to consult the Notices to Airmen and other flight information publications for supplemental data (Government's Trial Exhibit C). The additional information provided in these other publications includes the number and position of the runways, the existence of power lines and trees, construction and repairs on the runways, and the Flight Service Station to contact for still further data (Deposition of Galen Baird, Aug. 22, 1978, at 33, 36, 63, 64).[1]

2. On July 27, 1976, petitioner Baird, who was employed by petitioner Capitol Air Service, piloted a nonscheduled air taxi flight from Ulysses, Kansas to Paul Windle Airport at Greensburg, Kansas.[2] In making his approach to the Paul Windle Airport, Baird consulted the Wichita Sectional Aeronautical Chart (16th ed., June 17, 1976), which provided the following notation:

PAUL WINDLE
2230-L-28

According to the chart's legend, "Paul Windle" was the name of the airport, "2230" indicated the elevation in feet above sea level, and "L" denoted that there was lighting at

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[1]In addition, 14 C.F.R. 91.5 expressly requires every pilot before beginning a flight to familiarize himself with all available information, including "runway lengths at airports of intended use."

[2]Prior to his departure, petitioner Baird consulted the Airman's Information Manual, which showed that Paul Windle Airport had two runways and gave the position of those runways (Deposition of Baird, Aug. 22, 1978, at 33, 36, 63, 64). According to the Manual, the airport was not attended during the late evening (*id.* at 62). The Manual further stated that runway number 20 was 2800 feet long but gave no length for runway 17. Although Baird had never been to the Greensburg Airport before (*id.* at 36), and 14 C.F.R. 91.5 required him to obtain the length of *all* runways before beginning the flight, he did not contact the airport or the Flight Service Station for that information (Deposition of Baird, Aug. 22, 1978, at 39).

the airport from sunset to sunrise. "28" described the length of the longest runway in hundreds of feet (Pet. App. A4). The chart was prepared in accordance with the Inter-Agency Air Cartographic Committee specifications. Baird assumed, incorrectly, that it was the longer runway that was lighted. He touched down at the midpoint of the shorter runway, which his aircraft overran, causing it to crash. Two passengers were killed, and Baird and a third passenger were injured severely (Pet. App. A5).

3. On June 6, 1978, petitioners[3] filed this suit in the United States District Court for the District of Kansas, seeking recovery against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for damages arising from the government's failure to indicate on the sectional chart that the longer runway was not lighted. The district court (Pet. App. A23-A34) held that the government's determination as to what information to include in aeronautical charts was discretionary and therefore fell within the "discretionary function" exception to the Act, 28 U.S.C. 2680(a). It, accordingly, dismissed the action for want of subject matter jurisdiction.[4]

A divided panel of the court of appeals affirmed (Pet. App. A2-A22), relying principally on this Court's decision in *Dalehite* v. *United States*, 346 U.S. 15 (1953). Noting that the symbols on the Wichita Sectional Chart were in literal compliance with the IACC's specifications, the court of appeals characterized petitioners' suit as "a challenge of

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[3]In addition to the pilot and the air service company, their insurer, Vanguard Insurance Company, also was a plaintiff in the district court and is a petitioner here.

[4]The district court also held that the government could not be held liable on a strict liability theory for its conduct in regulating an ultra-hazardous activity, since the Federal Tort Claims Act does not permit the imposition of strict liability against the United States (Pet. App. A32).

the IACC's decision on how much possible ambiguity it was willing to tolerate from lack of detail on sectional aeronautical charts, in favor of other policy goals such as chart clarity" (Pet. App. A9). This, the court of appeals found, was "precisely the kind of discretionary judgment that Congress in section 2680(a) meant to shield from suit" (*id.* at A10). Judge Doyle dissented (*id.* at A13-A22).

ARGUMENT

1. Petitioners' principal claim (Pet. 12-18) is that the courts of appeals are hopelessly divided over how to apply the "discretionary function" exception. The illustrations offered by petitioners in support of this assertion merely show that courts faced with applying this exception have reached different results on different facts.[5] Even assuming that petitioners' assertion is correct, however, this case is not an appropriate vehicle for resolving any differences in approach, because the decision below is plainly consistent with this Court's decisions and does not conflict with the decisions of any other courts of appeals.

This Court determined in *Dalehite* v. *United States, supra*, 346 U.S. at 35-36, that discretionary functions within the meaning of the FTCA are those "determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." *Dalehite* describes perfectly the process behind the IACC's determination of "the extent of detail to be included in aeronautical sectional charts versus the extent of detail left

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[5]Although petitioners concede that the courts of appeals have generally adopted a "planning/operational" distinction in applying the discretionary function exception, they contend that the Fifth Circuit has criticized this analysis and has "chose[n] to strike new ground" in *Payton* v. *United States*, 636 F. 2d 132 (1981). We note that, on June 16, 1981, the Fifth Circuit granted rehearing en banc in *Payton*.

to be gleaned from other sources that the prudent pilot can be expected to consult" (Pet. App. A12). As the court of appeals observed (*ibid.*), petitioners' "claim is that the Wichita chart and all others like it should provide more detailed and hence more accurate information." Petitioners' suit thus involves a challenge to the IACC's discretionary judgment as to how much information can be included on the chart without detracting from its legibility.

Petitioner has cited no case holding the United States liable for failing to include additional information in its aeronautical charts and has presented no reason to believe that any other court of appeals would reach a result different from that of the Tenth Circuit in this case. Indeed, courts of appeals that have decided analogous cases have concluded that the suits were barred. In *Miller* v. *United States*, 378 F. Supp. 1147 (E.D. Ky. 1974), aff'd, 522 F. 2d 386 (6th Cir. 1975), plaintiff contended that stricter air safety rules would have prevented a crash. The Sixth Circuit held that "[t]he discretionary function exception to the Federal Tort Claims Act precludes the imposition of tort liability on the claimed failure to impose a more strict set of air safety regulations." 522 F. 2d at 387. See also *Reminga* v. *United States*, 631 F. 2d 449, 454-456 (6th Cir. 1980); *Spillway Marina, Inc.* v. *United States*, 445 F. 2d 876, 878 (10th Cir. 1971).

2. Petitioners also rely (Pet. 14-15) on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). That case involved the situation where a governmental agency undertook voluntarily to perform a task, which created a corresponding duty to perform it carefully.

In the present case, the government did not undertake to provide all the information on the sectional chart that a pilot might need in making a safe landing. To the contrary, the chart specifically cautions pilots to consult the Notices to Airmen and other publications for supplemental data.

All the information the government undertook to provide was (1) the altitude of the airport, (2) the availability of runway lights, and (3) the length of the airport's longest runway. The government did in fact provide this information—and provided it correctly. *Indian Towing* is simply inapplicable to this case. See *Magno* v. *Corros*, 630 F. 2d 224, 228-229 (4th Cir. 1980), cert. denied, No. 80-1376 (May 4, 1981).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners also assert (Pet. 18-19) that the "discretionary function" exception does not apply to governmental failure to warn of a known danger. Even assuming that the rule is as petitioners suggest, it cannot benefit them. Nothing in the record indicates that the danger at Paul Windle Airport was known to the government. Moreover, the government expressly warned petitioner Baird not to rely solely upon the information it supplied in the sectional chart. Under the circumstances, nothing more was required of the government.

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